APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1992
90cv00913

No. 91-7191

Stephen P. Rasch,

Appellant

v.

National Railroad Passenger Corporation,

Appellee

Appeal from the United States District Court for the District of Columbia

United States Court of Appeals for the District of Columbia Circuit

FILED MAR 23 1993

RON GARVIN
CLERK

Before: RUTH B. GINSBURG, WILLIAMS and RANDOLPH, *Circuit Judges.*

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral arguments of counsel. The court is satisfied that appropriate disposition of the case does not warrant an opinion. *See* D.C. Cir. Rule 14(c).

The district court set out "the unique circumstances of this case" that established Amtrak's inability to accommodate to Rasch's religious beliefs without undue hardship. We find no cause to disturb the judgment made on the record before that court. It is therefore

ORDERED and ADJUDGED, substantially for the reasons stated by the district court in its October 10, 1991 Memorandum Opinion, that the judgment from which this appeal has been taken be affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15(b)(2).

Per Curiam
FOR THE COURT:

/s/ Ron Garvin
RON GARVIN, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1992
DC CV 90-0913

No. 91-7191

Stephen P. Rasch,

Appellant,

v.

National Railroad Passenger Corporation, d/b/a Amtrak

United States Court of Appeals
For the District of Columbia Circuit

FILED MAY 28 1993

RON GARVIN
CLERK

BEFORE: Ruth B. Ginsburg, Williams and Randolph, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing, filed April 22, 1993, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1992
DC CV 90-0913

No. 91-7191

Stephen P. Rasch,

Appellant,

v.

National Railroad Passenger Corporation, d/b/a Amtrak

United States Court of Appeals
For the District of Columbia Circuit

FILED MAY 28 1993

RON GARVIN
CLERK

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

Appellant's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc,* that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Edwards did not participate in this matter.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-0913 (JHG)

STEPHEN P. RASCH,

Plaintiff,

v.

NATIONAL RAILROAD PASSENGER CORPORATION, D/B/A AMTRAK,

Defendant.

FILED

OCT 11 1991

CLERK, U.S. DISTRICT COURT DISTRICT OF COLUMBIA

MEMORANDUM OPINION

Plaintiff, Stephen P. Rasch ("Rasch"), filed this employment discrimination action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"). Rasch alleges that defendant, National Railroad Passenger Corporation ("Amtrak"), wrongfully discharged him for failing to work at times prohibited by his religion and seeks, *inter alia,* recovery of lost wages and employment benefits as a result of the allegedly wrongful termination.

On November 28, 1990, Amtrak moved for summary judgment. Rasch filed his opposition on December 10, 1990 and Amtrak filed its reply on December 20, 1990. In late

December and January, 1991, Rasch filed two motions to strike certain affidavits upon which Amtrak's motion for summary judgment relied. Amtrak filed its last opposition to these motions in February, 1991. In April, Rasch moved for leave to file a motion for summary judgment, which was granted on May 6, 1991. After granting both Rasch and Amtrak extensions of time, Rasch's motion for summary judgment became ripe on June 10, 1991.

Although the Court is sympathetic to the religious needs of the plaintiff and acknowledges the importance of religious accommodation in the workplace where possible, for reasons stated below, the Court grants Amtrak's motion for summary judgment and denies Rasch's motion for summary judgment.

BACKGROUND

The following facts are undisputed. Rasch is a practicing member of the Worldwide Church of God. His religious beliefs require that he not work during his Sabbath hours, from Sundown Friday to Sundown Saturday. In addition, he is not permitted to work during certain feast days, such as Passover, the Day of Atonement, the Feast of Trumpets, and the Feast of Tabernacles.

On April 26, 1987, Amtrak hired Rasch as an Assistant Conductor at its Zone 5 Crew Base, located in Washington, D.C. As an Assistant Conductor, Rasch worked on Amtrak's long-distance passenger trains in Zone 5.[1] He assisted in ensuring that the trains were operated in accordance with safety and operating rules, collected tickets, and performed other related duties. The terms and conditions of Rasch's employment were governed by the collective bargaining agreement between Amtrak and the United Transportation Union ("UTU"). Pursuant to that

[1] Zone 5 encompasses the territory from Washington, D.C. to Atlanta, Georgia and Florence, South Carolina and west to Pittsburgh, Pennsylvania.

agreement, employee assignments are made according to a "bid and bump" system—employees bid on posted positions and then receive their choice of assignments based on seniority.

Because Rasch had relatively low seniority, he ended up working on the "Extra Board" list of Assistant Conductors during all but a few months of his first nineteen months of employment. Extra Board employees do not have a fixed assignment; rather, they are assigned on an as-needed basis to work on trains when the regularly assigned crew members cannot work because of sickness, vacation, training, late arrival of trains, or any other reason. Moreover, the Assistant Conductors for one of Amtrak's regularly scheduled Friday trains always are selected from the Extra Board staff. Extra Board employees are guaranteed full-time pay and benefits, but work rules require them to be on call seven days a week, twenty-four hours per day.

Rasch indicated on his employment application that he could work any shift. Soon after he began work, however, he informed Amtrak that he could not work from sunset Friday to sunset Saturday and on six specific holidays because of his religious beliefs. On several occasions in 1987, Rasch sought the permission of his superior, Al Scala, to be excused from a Friday or Saturday assignment for religious reasons. For a period of time, whenever Rasch requested Scala's permission, Scala excused Rasch from working. Later, other employees began to complain that, in violation of the UTU contract, they were being required to work trips that Rasch should have worked but refused. Eventually, Rasch's attendance pattern was brought to the attention of Washington Crew Base management by the local UTU representative who relayed complaints from other employees. The crew dispatch officer in Philadelphia also informed management of this problem.

Shortly after the Washington Crew Base management learned of Rasch's excessive absences, he was counselled

that it would be necessary for him to comply with the requirements of the Extra Board to which he was assigned. Rasch's attendance record did not change, however. On June 21, 1988, in accordance with the UTU collective bargaining agreement, Rasch was sent a formal notice of investigation concerning his absences. Specifically, he was charged with being absent thirty-two times between February 6, 1988 and June 4, 1988. After the investigation was held, in a hearing pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, Rasch was found to have violated the terms of the UTU contract and was assessed a formal reprimand. That discipline subsequently was expunged from his file, with the warning that further excessive absenteeism would result in dismissal.

Despite the warning, Rasch continued to make himself unavailable for work. Rather than refuse assignments when they were made, Rasch failed to "mark up" in violation of the UTU Extra Board rules. After an employee completes a work assignment, he is required to "mark up," that is, to signify to the crew dispatcher that he is again available for work and should be put back on the Extra Board. Instead of reporting immediately, Rasch routinely waited to call in until it was so late that it was impossible to schedule him for work on Friday or Saturday. As a result of his late mark ups, Rasch was again charged with excessive absenteeism. Following a second investigative hearing, Rasch was dismissed from employment on November 15, 1988.

From April 26, 1987 to November 15, 1988, Rasch was unavailable to work 123 days. On five occasions, regularly assigned employees were required to work Rasch's assignment on their relief days. On twenty-seven occasions, Amtrak was forced to use Extra Board Conductors to fill Rasch's position. Under its collective bargaining agreement with UTU, Amtrak was obligated to pay those Conductors at a higher rate than Rasch would have been paid. On three occasions, Amtrak was forced to fill positions which

were vacant due to Rasch's absences with Assistant Conductors assigned to the Extra Board in other crew cases. According to the collective bargaining agreement, Amtrak was required to pay these substitutes more than it would have paid to Rasch. On three occasions, Amtrak had no available qualified employees to work Rasch's assignment and, therefore, had to operate the train with one less crew member than it ordinarily would have had.[2] Amtrak has

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[2] On December 11, 1990, counsel for Rasch filed a motion to strike the declaration of Joseph M. Fagnani, filed by defendant in support of its motion for summary judgment, which establishes these facts, as well as the corresponding assertions contained in Amtrak's Statement of Material Facts as to Which No Genuine Issue Exists. Fagnani based his statements on a report written by Howard J. Cossabone, which was, in turn, based on source documents not provided to Rasch during discovery. Claiming a right to examine the source documents, Rasch requested that the Court either refuse the application for Amtrak's motion for summary judgment or order a continuance of the motion for summary judgment and require that Amtrak produce the source documents in the interim. In addition, counsel for Rasch argued that the Court may not consider Fagnani's Declaration because it is not based on personal knowledge, does not set forth facts as would be admissible in evidence, and does not show affirmatively that Fagnani is competent to testify to the matters stated therein, all in violation of Fed. R. Civ. P. 56(e).

Concerned with the possibility that the Court might strike Fagnani's Declaration, on December 20, 1990, Amtrak filed Cossabone's affidavit with its Reply Memorandum to Plaintiff's Opposition to Defendant's Motion for Summary Judgment. Cossabone's declaration establishes the same facts substantiated in Fagnani's declaration.

Subsequently, Rasch filed a motion to strike the declaration of Mr. Cossabone, arguing that it is based on source documents not produced during discovery and that it does not satisfy the requirements of Fed. R. Civ. P. 56(e). Rasch also moved to strike the declarations of James M. Maguire, Albert A. Scala and Andrew A. Bell III, also filed with Amtrak's Reply, alleging that, to be valid, those declarations must be filed with an initial motion for summary judgment and not with a reply to an opposition to a summary judgment motion. Further, Rasch renewed its requests that the Court refuse Amtrak's application for summary judgment or, in the alternative, order a continuance and that the

introduced no documentation quantifying in dollars the eco-

Court strike the declaration of Fagnani.

The Court denies Rasch's motions to refuse application of Amtrak's motion for summary judgment and to reopen discovery even for a limited time and scope. The Court acknowledges that counsel for Rasch requested Amtrak to produce "[a]ny and all documents evidencing the nature and extent of any claimed undue hardship on the conduct of defendant's business operations" and that Amtrak did not produce the source records. However, during discovery, Amtrak submitted to Rasch a copy of the Fagnani Declaration which reveals on its face that it was based on an analysis of other records. Rasch, therefore, had notice of the source records and should have specifically requested them before discovery closed. Even after discovery ended, however, Amtrak offered Rasch the opportunity to examine the records in a letter dated December 10, 1990. As of January, 1991, plaintiff had made no effort to arrange to review the documents. Any hardship facing Mr. Rasch, therefore, was caused by his own failure to act.

Mr. Cossabone's declaration contains a list of the number of times Mr. Rasch failed to appear for work and the amount of times that a replacement could be found. Mr. Cossabone, who before his retirement was responsible for the processing and verification of all timecards and time claims for train and engine service employees, prepared the statistical summary after personally reading hundreds of documents, including long sheets, vacancy lists, and extra board standings lists. He states that none of the documents, standing alone, would provide all of the information contained in the declaration. Because the declaration was based on information obtained from reading the records, because the records were admissible under the business record exception to the hearsay rule, because the records were made available to the plaintiff, and because Cossabone is competent to testify to matters in the declaration, the Court will consider it along with other supporting documentation of both parties to this action. The motion to strike Fagnani's declaration is denied.

In addition, the Court will consider the declarations of Scala, Maguire, and Bell. There is no basis for striking the declarations simply because they were filed in support of Amtrak's reply. Amtrak submitted them in response to issues raised by Rasch in his opposition and, therefore, it would be unreasonable to strike them because they did not accompany the initial motion. Moreover, Rasch cannot claim unfair prejudice because the Court has provided Rasch with the opportunity to file additional responses to Amtrak's reply memorandum and declarations accompanying it.

nomic loss it has suffered as a result of Rasch's failure to work during his Sabbath.

Rasch has acknowledged that during his initial tenure with Amtrak, employment vacancies were posted in Amtrak's personnel office and that at least one company official suggested that Rasch go to the personnel office when his attendance problem first arose. Beyond providing these listings, however, and beyond Al Scala's excusals prior to UTU complaints, Amtrak took no affirmative action to accommodate Rasch's religious needs. Amtrak took no steps in negotiating with Rasch to reach an accommodation and did not seek the cooperation of the UTU in attempting to satisfy Rasch's religious requirements. Amtrak apparently never explored with UTU the possibility of allowing another employee, A.L. Boyd, to voluntarily work in Rasch's place on Rasch's Sabbath.

Although Rasch stopped in the personnel office on many occasions to examine the posted positions, he applied for transfer to only one position prior to his termination. That position was for an Assistant Conductor in Zone 2. Pursuant to the collective bargaining agreement, employees transferring from Zone 5 to Zone 2 forfeit their accrued seniority. Therefore, Rasch would have been the most junior employee on the Zone 2 seniority roster. As such, he would have worked on the Zone 2 Extra Board, just as he had on the Zone 5 Extra Board, and would have been subject to the same availability requirements.

In October, 1988, one month before Amtrak terminated Rasch, an employee junior to Rasch was awarded an Assistant Conductor position in Salisbury, North Carolina. The position, previously held by an employee senior to Rasch, did not require the holder to work on Friday evenings or Saturdays, and, therefore, could have accommodated Rasch's religious needs. Although Rasch would have received the position had he applied for the job, neither Amtrak nor Rasch was aware of that fact until after the

position was awarded since neither knew whether an employee senior to Rasch would have applied for the job. Because of the collective bargaining agreement, the junior employee could not be bumped from the position until April, 1989, and by that time, Rasch had been terminated from Amtrak employment.

Rasch was reinstated to Amtrak service on September 30, 1989. At that time, Al Scala informed Rasch that a position was available in Salisbury, North Carolina which Rasch had sufficient seniority to hold and which would permit him to observe his Sabbath. Rasch bid on and was awarded the position. Rasch is now sufficiently senior to continue to hold a position which enables him to observe his Sabbath.

DISCUSSION

Under § 703(a)(1) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2,

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

To establish a *prima facie* case of religious discrimination under this provision, a plaintiff must prove: (1) that he subscribes to a bona fide religious belief that conflicts with an employment requirement, (2) that he informed the employer of this belief; and (3) that he was disciplined or discharged for failing to comply with the conflicting employment requirement. *See Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 133 (3d Cir. 1986), *cert. denied*, 479 U.S. 972 (1986); *Turpen v. Missouri-Kansas-Texas R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984).

Once the plaintiff has established these elements, the defendant has the burden of proving certain facts to avoid liability under the provision. If a defendant has failed to make a good faith effort to accommodate a plaintiff's religious beliefs, the defendant must prove that it would have been impossible to accommodate those religious needs without incurring undue hardship. *See* 42 U.S.C. § 2000e(j) ("The term 'religion' [for purposes of Title VII] includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."). *See also E.E.O.C. v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 614-15 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989) ("[w]hen an employer does not propose an accommodation . . . the employer must accept the employee's proposal or demonstrate that the proposal would cause the employer undue hardship"), *citing American Postal Workers Union v. Postmaster General*, 781 F.2d 772, 776 (9th Cir. 1986) and *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1988).[3]

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[3] Rasch argues that if a defendant does not attempt to accommodate an employee's religious needs, it may not raise as a defense the impossibility of accommodation without undue hardship. The court rejects Rasch's argument. Although the cases which Rasch cites, *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403 (9th Cir. 1978) and its companion case, *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397 (9th Cir. 1978), support Rasch's position, subsequent cases have expressly disapproved of those holdings. *See Townley* at 625, *citing Ansonia*, 479 U.S. at 68-69. As the *Townley* opinion states, "If an employer can show that no accommodation was possible without undue hardship, it makes no sense to require that he engage in a futile act." *Id.* Although some courts deciding religious discrimination claims have required employers to show that they have made accommodation efforts, those generally have been in a factual context where accommodation to the employee's religious practices appeared possible. *See, e.g., EEOC v. Ithaca Industries*, 849 F.2d 116 (4th Cir. 1988), *cert. denied*, 488 U.S. 928 (1988), a case in which the defendant-employer was not bound by a seniority system.

Although Amtrak does not dispute Rasch's assertion that he has met his *prima facie* case, it has moved for summary judgment, arguing that it could not have made any accommodation of Rasch's religious needs without incurring undue hardship. Rasch also has moved for summary judgment, alleging that Amtrak could have accommodated his religious beliefs without undue hardship by transferring him to another position and that Amtrak's failure to do so makes it liable under Title VII.

Summary judgment is appropriate when there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "The inquiry performed is the threshold inquiry of determining whether there is a need for trial—whether, in other words, there are any genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In considering a motion for summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. At the same time, *however*, Rule 56 places a burden on the non-moving party to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

Though Rasch has proposed numerous ways in which Amtrak could have accommodated his religious requirements, under the applicable precedent and based on factual inferences drawn in favor of Rasch, the Court finds that it would have been impossible for Amtrak to accommodate Rasch's religious needs without incurring undue hardship. Therefore, the Court grants Amtrak's motion for summary judgment and denies Rasch's motion for summary judgment.

Rasch has proposed that Amtrak allow him to keep his job as an Assistant Conductor on the Extra Board staff and permit him to observe his Sabbath by finding substitutes to cover for him. However, according to well-settled Supreme Court precedent, such an accommodation would work an undue hardship on Amtrak. In the landmark case of *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), a case with facts remarkably similar to the ones before this Court, the Supreme Court held that it would be an undue hardship to require an employer to alter a facially neutral system for scheduling employees simply to accommodate the religious beliefs of one employee. The Court based its conclusion on Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), by which Congress gave special deference to seniority systems.[4] Because assigning substitutes, volunteers or not, to replace Rasch on his Sabbath would clearly violate the seniority system established by the collective bargaining agreement between Amtrak and UTU, Amtrak need not make such an accommodation.

Rasch further alleges that Amtrak could accommodate his religious needs without incurring undue hardship by "blanking" his position on his Sabbath days—that is, not requiring Rasch to work on his Sabbath and not obtaining a substitute for him. Rasch claims that Amtrak could save money by blanking because even if Amtrak were required to pay extra wages to members of a short crew, the sum

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[4] 42 U.S.C. § 2000e-2(h) provides in relevant part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . ., provided that such differences are not the result of an intention to discriminate because of . . . religion . . . .

Rasch has provided no evidence even remotely establishing that the collective bargaining agreement between Amtrak and UTU was the result of an intention to discriminate because of religion.

of those amounts would be less than what Amtrak would have had to pay Rasch had he worked. Rasch, however, has submitted an affidavit of Salvatore Bruno, an employee of Amtrak, in which Mr. Bruno forcefully asserts that Amtrak makes "every attempt . . . to fill every assignment for a particular train." Bruno deposition at 49, attached to Plaintiff's Memorandum of Points and Authorities in Opposition to Amtrak's Motion for Summary Judgment. Because Amtrak does not regularly blank positions even though it may save money by doing so, and due to the frequency with which Amtrak would have to operate a short crew to accommodate Rasch, blanking the position would create an undue hardship. The district court and the Supreme Court in *Hardison* have held similarly. *See Hardison,* U.S. at 84 n.15; 375 F. Supp. 877, 891 (W.D. Missouri 1974).

Rasch contends further that Amtrak should have transferred him to another job within the organization which would not require him to work on his Sabbath. Specifically, Rasch points to the position in Salisbury, North Carolina which he now holds. It is undisputable, however, that Amtrak could not have known that Rasch could have held that position, or any other position for that matter, until after all of the applications were filed, due to the seniority system under the collective bargaining agreement. Obviously, if Amtrak was not aware that Rasch could have held the position, it could not have transferred Rasch to that position. Moreover, Amtrak did as much as it could to notify Rasch of job openings. Rasch has conceded that Amtrak posts all employment vacancies in its personnel office and that he applied for only one position on the board. Because Amtrak provided Rasch with full notice of employment opportunities, because of the seniority provisions binding Amtrak and its employees, and because Amtrak could not reasonably foresee which jobs Rasch could have held until after all applications were received, the Court holds that under the unique circumstances of

this case, Amtrak did not violate Title VII by failing to locate for the plaintiff a position which would accommodate his religious needs. *See Brener v. Diagnostic Center Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982) (an employee who cannot not work on his Sabbath is required to explore his employer's flexible scheduling system before he can seek additional accommodation from his employer); *Mann v. Chrysler Corp.*, 561 F.2d 1282, 1286 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978) (where employee "will not attempt to accommodate his own beliefs through the means already available to him or cooperate with his employer in its conciliatory efforts he may forego the right to have his beliefs accommodated by his employer").

CONCLUSION

For the reasons stated above, the Court finds that Amtrak was unable to make any accommodation of Rasch's religious beliefs without suffering undue hardship and, therefore, did not violate the provisions of Title VII. On the accompanying Judgment issued this date, summary judgment is ordered in favor of the defendant and against the plaintiff and the plaintiff's motion for summary judgment will therefore be denied.

October 10, 1991.

/s/ Johce Hens Green
JOYCE HENS GREEN
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-0913 (JHG)

STEPHEN P. RASCH,

Plaintiff,

v.

NATIONAL RAILROAD PASSENGER CORPORATION, D/B/A AMTRAK,

Defendant.

FILED

OCT 11 1991

CLERK, U.S. DISTRICT COURT, DISTRICT OF COLUMBIA

JUDGMENT

For the reasons set forth in the accompanying memorandum opinion issued this date, summary judgment is hereby entered in favor of the defendant, National Railroad Passenger Corporation, D/B/A Amtrak, and against the plaintiff, Stephen P. Rasch.

IT IS SO ORDERED.
October 10, 1991

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

APPENDIX F

PART 1605—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION

Sec.

1605.1 "Religious" nature of a practice or belief.

1605.2 Reasonable accommodation without undue hardship as required by Section 701(i) of Title VII of the Civil Rights Act of 1964.

1605.3 Selection practices.

Appendix A to §§ 1605.2 and 1065.3 Background information.

Authority: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq.

§ 1605.1 "Religious" nature of a practice or belief.

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States v. Seeger,* 380 U.S. 163 (1965) and *Welch v. United States,* 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions.[1] The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. The phrase "religious practice" as used in these Guidelines includes both religious observances and practices, as stated in Section 701(j). 42 U.S.C. 2000e(j).

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[1] See CD76-104 (1976), CCH P 6500; CD 71-2620 (1971), CCH P 6283; CD 71-779 (1970), CCH P 6180.

§ 1605.2 Reasonable accommodation without undue hardship as required by Section 701(j) of Title VII of the Civil Rights Act of 1964.

(a) *Purpose of this section.*

This section clarifies the obligation imposed by Title VII of the Civil Rights Act of 1964, as amended, (sections 701(j), 703 and 717) to accommodate the religious practices of employees and prospective employees. This section does not address other obligations under Title VII not to discriminate on grounds of religion, nor other provisions of Title VII. This section is not intended to limit any additional obligations to accommodate religious practices which may exist pursuant to constitutional, or other statutory provisions; neither is it intended to provide guidance for statutes which require accommodation on bases other than religion such as § 503 of the Rehabilitation Act of 1973. The legal principles which have been developed with respect to discrimination prohibited by Title VII on the bases of race, color, sex, and national origin also apply to religious discrimination in all circumstances other than where an accommodation is required.

(b) *Duty to accommodate.*

(1) Section 701(j) makes it an unlawful employment practice under § 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.[2]

(2) Section 701(j) in conjunction with § 703(c), imposes an obligation on a labor organization to reasonably accommodate the religious practices of an employee or prospective employee, unless the labor organization demonstrates that accommodation would result in undue hardship.

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[2] See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).

(3) Section 1605.2 is primarily directed to obligations of employers or labor organizations, which are the entities covered by Title VII that will most often be required to make an accommodation. However, the principles of Section 1605.2 also apply when an accommodation can be required of other entities covered by Title VII, such as employment agencies (§ 703(b)) or joint labor-management committees controlling apprenticeship or other training or retraining (§ 703(d)). (See, for example, § 1605.3(a) "Scheduling of Tests or Other Selection Procedures.")

(c) *Reasonable Accommodation.*

(1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities such as compensation, terms, conditions, or privileges of employment. Therefore, when there

is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

(d) *Alternatives for Accommodating Religious Practices.*

(1) Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules. The following subsections are some means of accommodating the conflict between work schedules and religious practices which the Commission believes that employers and labor organizations should consider as part of the obligation to accommodate and which the Commission will consider in investigating a charge. These are not intended to be all-inclusive. There are often other alternatives which would reasonably accommodate an individual's religious practices when they conflict with a work schedule. There are also employment practices besides work scheduling which may conflict with religious practices and cause an individual to request an accommodation. See, for example, the Commission's finding number (3) from its Hearings on Religious Discrimination, in Appendix A to §§ 1605.2 and 1605.3. The principles expressed in these Guidelines apply as well to such requests for accommodation.

(i) Voluntary Substitutes and "Swaps".

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and

labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

(ii) Flexible Scheduling.

One means of providing reasonable accommodation for the religious practices of employees or prospective employees which employers and labor organizations should consider is the creation of a flexible work schedule for individuals requesting accommodation.

The following list is an example of areas in which flexibility might be introduced: flexible arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices.[3]

(iii) Lateral Transfer and Change of Job Assignments.

When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer.

(2) Payment of Dues to a Labor Organization.

Some collective bargaining agreements include a provision that each employee must join the labor organization or pay the labor organization a sum equivalent to dues. When an employee's religious practices do not permit com-

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[3] On September 29, 1978, Congress enacted such a provision for the accommodation of Federal employees' religious practices. See Pub. I. 95-390. 5 U.S.C. 5530, "Compensatory Time Off for Religious Observances."

pliance with such a provision, the labor organization should accommodate the employee by not requiring the employee to join the organization and by permitting him or her to donate a sum equivalent to dues to a charitable organization.

(e) Undue Hardship.

(1) Cost.

An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require "more than a *de minimis* cost".[4] The Commission will determine what constitutes "more than a *de minimis* cost" with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the *Hardison* decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison,* would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a *de minimis* cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

(2) Seniority Rights. Undue hardship would also be shown where a variance from a bona fide seniority system is

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[4] *Hardison, supra,* 432 U.S. at 84.

necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system. *Hardison, supra,* 432 U.S. at 80. Arrangements for voluntary substitutes and swaps (see paragraph (d)(1)(i) of this section) do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system. Nothing in the Statute or these Guidelines precludes an employer and a union from including arrangements for voluntary substitutes and swaps as part of a collective bargaining agreement.

§ 1605.3 Selection practices.

(a) Scheduling of Tests or Other Selection Procedures. When a test or other selection procedure is scheduled at a time when an employee or prospective employee cannot attend because of his or her religious practices, the user of the test should be aware that the principles enunciated in these guidelines apply and that it has an obligation to accommodate such employee or prospective employee unless undue hardship would result.

(b) Inquiries Which Determine An Applicant's Availability to Work During An Employer's Scheduled Working Hours.

(1) The duty to accommodate pertains to prospective employees as well as current employees. Consequently, an employer may not permit an applicant's need for a religious accommodation to affect in any way its decision whether to hire the applicant unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship.

(2) As a result of the oral and written testimony submitted at the Commission's Hearings on Religious Discrimination, discussions with representatives of organizations interested in the issue of religious discrimination, and the comments received from the public on

these Guidelines as proposed, the Commission has concluded that the use of pre-selection inquiries which determine an applicant's availability has an exclusionary effect on the employment opportunities of persons with certain religious practices. The use of such inquiries will, therefore, be considered to violate Title VII unless the employer can show that it:

(i) Did not have an exclusionary effect on its employees or prospective employees needing an accommodation for the same religious practices; or

(ii) Was otherwise justified by business necessity.

Employers who believe they have a legitimate interest in knowing the availability of their applicants prior to selection must consider procedures which would serve this interest and which would have a lesser exclusionary effect on persons whose religious practices need accommodation. An example of such a procedure is for the employer to state the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours. Then, after a position is offered, but before the applicant is hired, the employer can inquire into the need for a religious accommodation and determine, according to the principles of these Guidelines, whether an accommodation is possible. This type of inquiry would provide an employer with information concerning the availability of most of its applicants, while deferring until after a position is offered the identification of the usually small number of applicants who require an accommodation.

(3) The Commission will infer that the need for an accommodation discriminatorily influenced a decision to reject an applicant when: (i) prior to an offer of employment the employer makes an inquiry into an applicant's availability without having a business necessity justification;

and (ii) after the employer has determined the applicant's need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.